



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN: 3206-AM58

Flag Recognition Benefit for Fallen Federal Civilian Employees

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to implement the Civilian Service Recognition Act of 2011. The final regulations will assist agencies in administering a United States flag recognition benefit for fallen Federal civilian employees, and describe the eligibility requirements and procedures to request a flag.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management, following coordination with the U.S. Department of Defense and the U.S. Department of Homeland Security, issued proposed regulations and requested comments on June 17, 2013, (78 FR 36312) to implement the Civilian Service Recognition Act of 2011 (Pub. L. 112-73, December 20, 2011), hereafter referred to as “the Act.” For those civilian employees who die under certain circumstances in the course of serving their country, the

Act authorizes agency heads to give United States flags to beneficiaries as a way to formally express sympathy and gratitude on behalf of the Nation.

OPM received comments from two Federal agencies, a private association for career federal executives (“the Association”), and two individuals. We reviewed the public comments, considered them, and decided upon any revisions we concluded were appropriate in light of that consideration. We have summarized the comments below, and also indicate how we disposed of them in the final regulations.

Background

The Act authorizes, and these regulations provide policies for, recognizing certain Federal civilian employees who die of injuries incurred in connection with their employment for their duty and sacrifice. Prior to this legislation, a few agencies had separate, limited authority to confer such recognition. Under the Act, Executive agencies, the United States Postal Service, and the Postal Regulatory Commission may furnish flags to the beneficiaries of employees who died of injuries incurred in connection with their employment as a result of criminal acts, acts of terrorism, natural disasters, or other circumstances as determined by the President.

OPM is amending part 550 of title 5, Code of Federal Regulations, by adding a new subpart (subpart O) titled “Flag Recognition Benefit for Fallen Federal Civilian Employees” that establishes a comprehensive, Governmentwide approach to honor Federal civilian employees who die of certain injuries incurred in connection with their employment. These regulations also provide agencies flexibility to develop additional procedures when honoring these employees.

General

We received a comment from a Federal agency recommending OPM revise § 550.1501(a) to indicate that the employee's injuries must be incurred in connection with his or her employment with the Federal Government, as stated in the statute. We agree with the agency's suggested change and have revised the paragraph to mirror the statutory language.

Eligibility

We received four comments (three from the Association and one from an individual) regarding eligibility for a flag. Both the Association and the individual observed that the phrase "other circumstances" was vague and that clarification was needed to define what constitutes "other circumstances." The Association suggested that there be additional guidance to assist agencies to determine whether a cause of death that does not fall neatly into a stated category should be granted. The individual stated that OPM should revise § 550.1504(iv) to provide that the President may delegate this determination.

OPM expects that most deaths warranting flag recognition will fall into the categories specified in law (i.e., a criminal act, an act of terrorism, or a natural disaster). In any event, at this time, the authority to determine which other circumstances would warrant such recognition is reserved to the President. OPM cannot confer authorities upon the President, but there is nothing in the Act that precludes the President from delegating this authority in the future if he wishes to do so.

In addition, one comment stated that OPM should track deaths that did not fall into one of the original categories. OPM will not track the "other circumstance" cause of

death requests as we anticipate they will occur rarely and, therefore, we do not see the need to establish an additional administrative process.

Order of Precedence

We received four comments (two from individuals, one from the Association, and one from an agency) regarding order of precedence when granting a flag. Three of the comments focused on including same-sex marriage, domestic partnership, or civil unions in the order of precedence.

The Act already provides that widows or widowers may be awarded a flag. On June 26, 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. As a result of this decision, there would be no basis for construing “widow” or “widower” as excluding surviving spouses of same-sex marriages. The surviving spouse of a same-sex marriage would be a widow or widower, and this category is already included in the order of precedence.

Surviving members of a domestic partnership or civil union could also qualify to be recipients of a flag, within the order of precedence, but only within the category of those having a close family affiliation. The “close family affiliation” category encompasses any non-marital domestic partner, whether same-sex or different-sex, irrespective of whether the individual was in a state-sanctioned legal relationship, such as a civil union or domestic partnership, with the deceased employee. Although requests from surviving members of a domestic partnership or civil union would not receive the same level of precedence as surviving spouses of same-sex marriages, that result is a function of the statutory language itself. The statute specifically identified “spouses,” but not survivors of domestic partnerships or civil unions as among the individuals who

would be eligible for such a benefit by virtue of the statute itself. The statute provided OPM with the means to determine what other sorts of relationships might justify the award of a flag, but only for the situation where no request has been received from a spouse, child, sibling, or parent of the deceased employee.

The Association's comment focused on defining "close family affiliation" and providing examples. The commenter suggested that the term is unclear. OPM believes the established order of precedence, which is modeled after other similar listings in regulation, is clear as listed. The term "close family affiliation" conveys a generally understood type of relationship and the regulation leaves its application to agency discretion on a case-by-case basis.

Beneficiary Responsibilities

We received two comments on beneficiary responsibilities (one from an individual and one from the Association). Both commenters noted a concern that the burden of proving eligibility would fall disproportionately on the next of kin and argued that a formal written request with supporting documentation should not be necessary because the agency will already be aware of the circumstances surrounding the employee's death, and therefore his or her eligibility for the flag benefit. The Association also recommended the agency notify the beneficiary of the flag benefit to ease the burden of a grieving beneficiary and make the distribution of a flag as smooth and quick as possible. We agree that in most cases an agency will already be aware of the circumstances of an employee's death in these types of situations and generally will not need to require proof of the employee's eligibility. Therefore, we have revised §

550.1506 of the regulations to focus on having the agency assist a grieving beneficiary in requesting a flag in a timely manner by making the necessary determinations.

Agency Responsibilities

We received two comments from one agency on agency responsibilities. One comment recommends that OPM revise § 550.1507(a) to remove the requirement for an agency to include in its procedures reaching out to survivors of known eligible employees to provide information and offer assistance on obtaining the flag. We have considered this recommendation and have revised this provision to make it clear that an agency is required to adopt such procedures only if it determines it wishes to award a flag pursuant to the Act. When an agency has made such a determination, it must reach out to survivors of known eligible employees in order to ease any burden on the beneficiaries of obtaining a flag. We encourage each agency to make a decision in advance of receiving a first request under the Act whether the agency will want to furnish a flag in an appropriate case. If the answer is in the affirmative, the agency would be well-advised to adopt these procedures in advance, so that it will be in a position to assist a potential beneficiary expeditiously if and when a potentially appropriate case arises.

The agency also recommends that OPM revise § 550.1507(b) to provide agencies with the flexibility to establish their own process for notifying employees of the flag benefit. We concur that agencies should have flexibility in notifying employees and have removed the example, “usually as part of the agency’s regular benefits information sharing,” that was perceived to limit this flexibility. In order to provide consistency Governmentwide, we have maintained the requirement that the notification should occur annually.

Miscellaneous Issues

We have made additional revisions to the text of § 550.1501 General, § 550.1505 Order of precedence, and § 550.1506 Beneficiary receipt of a flag in order to achieve greater technical clarity. The substance of these provisions has not been changed.

E.O. 12866, Regulatory Review

This rule has been reviewed by the U.S. Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

U.S. Office of Personnel Management

Katherine Archuleta
Director

Accordingly, OPM is amending part 550 of title 5, Code of Federal Regulations, by adding a new subpart O to read as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart O—Flag Recognition Benefit for Fallen Federal Civilian Employees

Authority: 5 U.S.C. 5570 note; also issued under Sec. 2 of Pub. L. 112-73, 125 Stat.784-785.

Sec.

- 550.1501 General.
- 550.1502 Coverage.
- 550.1503 Definitions.
- 550.1504 Eligibility.
- 550.1505 Order of precedence.
- 550.1506 Beneficiary receipt of a flag.
- 550.1507 Agency responsibilities.

Subpart O—Flag Recognition Benefit for Fallen Federal Civilian Employees

§ 550.1501 General.

(a) Statutory authority. This subpart implements the Civilian Service Recognition Act of 2011 (Public Law 112-73; December 20, 2011), reprinted as a note to 5 U.S.C.A. 5570, which authorizes agencies to give a flag of the United States to a beneficiary of a Federal civilian employee who dies of injuries incurred in connection with his or her employment with the Federal Government, under specific circumstances.

(b) Eligibility. Agencies may furnish a flag to the beneficiary (as defined in § 550.1503) of an eligible employee (as specified in § 550.1504) who died on or after December 20, 2011.

§ 550.1502 Coverage.

This subpart applies to—

(a) Executive agencies as defined in section 105 of title 5, United States Code, the United States Postal Service, and the Postal Regulatory Commission; and

(b) Employees as defined in section 2105 of title 5, United States Code; an officer or employee of the United States Postal Service; and an officer or employee of the Postal Regulatory Commission.

§ 550.1503 Definitions.

In this subpart—

Agency means an Executive agency as defined in 5 U.S.C. 105, the United States Postal Service, or the Postal Regulatory Commission.

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Beneficiary means the eligible person who may request the flag following the order of precedence specified in § 550.1505.

Employee means an employee as defined in section 2105 of title 5, United States Code; an officer or employee of the United States Postal Service; and an officer or employee of the Postal Regulatory Commission.

Flag means a standard United States flag that is at least 3 feet by 5 feet.

§ 550.1504 Eligibility.

(a) An authorized agency official may, upon the request of a beneficiary, furnish one United States flag for an individual who—

(1) Was an employee of the agency at the time of death; and

(2) Died of injuries incurred in connection with such individual's employment

with the Federal Government suffered as a result of—

(i) A criminal act;

(ii) An act of terrorism;

(iii) A natural disaster; or

(iv) Other circumstances, as determined by the President.

(b) An authorized agency official may not furnish a flag when the death is the result of—

(1) Unlawful or negligent action of the employee;

(2) Willful misconduct of the employee; or

(3) Activities unrelated to the employee's status as a Federal employee.

(c) The decision whether to furnish a flag to the beneficiary of an eligible employee is at the discretion of the agency. When an authorized agency official determines the agency will furnish a flag for a deceased eligible employee, the official must follow the order of precedence specified in § 550.1505.

§ 550.1505 Order of precedence.

If the authorized agency official determines the agency will furnish a flag, it must be issued to one beneficiary pursuant to the following order of precedence—

(a) The widow or widower;

(b) If none, to a child (including step, foster, or adopted child), according to age (i.e., oldest to youngest);

(c) If none, to a parent (including step, foster, or adoptive parent);

(d) If none, to a sibling (including step, half, or adopted sibling), according to age (i.e., oldest to youngest);

(e) If none, to any individual related by blood or close family affiliation.

§ 550.1506 Beneficiary receipt of a flag.

One eligible beneficiary, following the order of precedence in § 550.1505, may be provided a flag by the agency once the agency has—

- (a) Documented the date and nature of death of the employee and certified that it conforms to the eligibility criteria in § 550.1504;
- (b) Received a request from a beneficiary; and
- (c) Established the beneficiary's relationship to the deceased employee and determined whether the beneficiary may receive the flag, consistent with the order of precedence under 550.1505.

§ 550.1507 Agency responsibilities.

To efficiently and effectively implement the provisions of the law and these regulations, an agency that wishes to furnish a flag pursuant to this part must —

- (a) Establish procedures for procuring and furnishing a flag, including reaching out to survivors of known eligible employees to provide information and offer assistance on obtaining a flag;
- (b) Notify its employees of the flag benefit annually; and
- (c) Disclose information necessary to prove that a deceased individual is an eligible employee as described in § 550.1504 to the extent that such information is not classified and to the extent that such disclosure does not endanger the national security of the United States.

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